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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

Case No. 79-368

THE LAW FIRM OF CALIG AND WATERMAN, et al.,
Petitioners,

v.

SUPREME COURT OF OHIO, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners filed an original action in the Supreme Court of Ohio seeking a declaratory judgment that Disciplinary Rule DR 2-101 (B) of the Code of Professional Responsibility, which governs advertising by attorneys in Ohio, is unconstitutional. The pertinent portion of the rule is set forth in the petition. It provides, in substance that an attorney may advertise in a dignified manner in print media or over radio or television. The definition of print media does not include billboards.

Petitioners alleged that they were engaged in the practice of law and wished to advertise the availability of their services on billboards. They claimed that the refusal to permit them to advertise on billboards violates their right to freedom of speech.

On June 8, 1979, the Supreme Court of Ohio, sua sponte, ordered that the cause be dismissed. The Order is set forth in the petition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners are not entitled to invoke the jurisdiction of this Court.

Petitioners did present their federal claim to the state court for determination. This is not sufficient, however, to entitle them to invoke the jurisdiction of this Court. They must also establish that their federal claim was either determined by the state court or that the judgment as rendered could not have been given without determining the federal claim.

> We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U.S. 206, 212-213 (1938).

See also Lynch v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934); *Adams* v. *Russell*, 229 U.S. 353, 360-361 (1913).

In the instant case the state court did not decide the federal question and petitioners cannot establish that the judgment of that court could not have been rendered without deciding it.

Petitioners attempted to invoke the original jurisdiction of the state supreme court to obtain a declaratory judgment. In their petition they claim that the Supreme Court of Ohio has "exclusive and absolute" authority over matters relating to the government of the bar citing *Smith* v. *Kates*, 46 Ohio St.2d 263 (1976). They also claim that Chapter 2721 of the Ohio Revised Code gives the Supreme Court of Ohio authority to grant declaratory judgments.

The Supreme Court of Ohio does have "exclusive and absolute" authority over all matters relating to the practice of law in Ohio. This does not mean, however, that a person may institute an original action in the Supreme Court of Ohio merely because the subject matter of the action relates to the practice of law. This is shown by the holding in *Smith* v. *Kates, supra*, 46 Ohio St.2d 263, the case relied upon by petitioners.

The *Smith case* involved two proceedings. The complainants in those proceedings, an individual and a corporation, sought to invoke the original jurisdiction of the Supreme Court of Ohio to obtain the removal and suspension of an attorney and a judge. The subject matter of the proceedings, misconduct by attorneys and judges, clearly relates to the practice of law. The Supreme Court of Ohio, however, dismissed the proceedings. It explained that disciplinary proceedings were governed by Rule V of the Rules for the Government of the Bar. Such proceedings could only be instituted by the filing of a complaint, signed by a member of the bar and certified by an officer of the state or a local bar association, with the Board of Commissioners on Grievances and Discipline.

Petitioners' claim that Chapter 2721 gives the Supreme Court of Ohio jurisdiction to grant declaratory judgments is foreclosed by applicable decisions of the state court. The statutes contained in that chapter do not confer jurisdiction on any court. They merely create a remedy which may be granted by a court which otherwise has jurisdiction.

> Statutes which create a declaratory judgment procedure do not extend the jurisdiction of the subject matter of a court but rather extend the power of the court to grant declaratory relief within its respective jurisdiction. In other words, declaratory judgment statutes provide an additional remedy which may be granted by a court but they do not extend the jurisdiction as to the subject matter upon which a court may act. *State ex rel. Neer* v. *Indus. Comm.*, 53 Ohio St.2d 22, 23, 371 N.E.2d 842, 843 (1978) quoting from *State ex rel. Foreman* v. *Bellefontaine Municipal Court,* 12 Ohio St.2d 26, 28, 231 N.E.2d 70,71 (1967).

See also Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

Jurisdiction is conferred upon the Supreme Court of Ohio by the Constitution. That jurisdiction cannot be limited or enlarged by statute. Paragraph one of the syllabus of *State* v. *Mansfield*, 89 Ohio St. 20, 104 N.E. 1001 (1913); *State ex rel. Cleveland Municipal Court* v. *Cleveland City Council*, 34 Ohio St.2d 120, 122, 296 N.E.2d 544, 547 (1973).

The original jurisdiction of the Supreme Court of Ohio is contained in Section 2(B) (1) of Article IV of the Constitution. That section, which is set forth as Appendix A, gives the court no jurisdiction in declaratory judgment.

The judgment of dismissal by the state supreme court might have rested, and under the applicable state law probably did rest, upon the ground that that court did not have original jurisdiction in declaratory judgment.

Respondents respectfully submit that, in this situation, this Court should refuse jurisdiction. *Stembridge* v. *Georgia*, 343 U.S. 541 (1952); *Phyle* v. *Duffy*, 334 U.S. 431, 444 (1948); *Woods* v. *Nierstheimer*, 328 U.S. 211, 214 (1946).

2. The petition does not present a substantial question.

Respondents submit that, even if this Court should find that the Supreme Court of Ohio did determine the merits of petitioners' federal claim, it should still refuse to take jurisdiction since the questions raised are not important enough to warrant review.

Petitioners argue that a decision upholding the validity of the challenged rule is not in accord with the decision in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85 (1977). Respondents respectfully submit that the *Linmark case* is readily distinguishable from the instant case.

Linmark involved an ordinance which prohibited "For Sale" and "Sold" signs. The township officials attempted to defend the ordinance on the ground that it merely restricted the time, place and manner of speech. This Court stated that such laws stand on a different footing from those prohibiting speech altogether. It found, however, that the ordinance was not a true time, place and manner restriction.

The ordinance did not leave open any practical alternative channels for communication. Real estate is not marketed through leaflets, sound trucks, demonstrations and the like. The only realistic alternatives for sellers are listing with real estate agents and newspaper advertising. Such methods involve more cost and less autonomy than yard signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for conveying the information. *Id.* at 93. Testimony showed that selling real estate without signs takes twice as long as selling with signs. *Id.* at 89.

In addition the ordinance was not genuinely concerned with the place or manner of the speech. It was aimed at the content of the speech, the message that the signs were intended to convey. The ordinance was enacted because the township feared that the information conveyed by the signs would cause the persons receiving such information to act upon it. *Id.* at 93-94.

The rule challenged in the instant case does leave open ample alternative channels for communication. Attorneys who wish to advertise the availability and cost of their services may do so over radio and television and in newspapers, magazines and other periodicals, telephone directories, city, county and suburban directories, law directories and law lists.

The rule is not aimed at the content of the speech. It is not concerned with the information which the advertising conveys but only with the manner--on billboards--in which it is conveyed. The rule expressly permits attorneys to convey the same information by all of the methods listed above.

The challenged rule merely regulates the manner in which attorneys may advertise their services. Such a regulation is permissible so long as it is imposed without reference to the content of the regulated speech, serves a significant governmental interest and leaves open ample alternative channels for the communication of the information. *Friedman* v. *Rogers*, _____U.S. _____, 99 S.Ct. 887, 894, 59 L.Ed.2d 100, 109-110 (1979); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977); *Virginia Pharmacy Board* v. *Virginia Consumers Council*, 425 U.S. 748, 771 (1976).

Petitioners claim that the rule is based upon the content of the speech. The sole basis for their claim is that the rule is only applicable to attorneys. If petitioners were correct it would invalidate any regulation of advertising by attorneys in this state. Such advertising is regulated by rules adopted by the Supreme Court of Ohio. These rules are necessarily limited to attorneys since the authority of that court is limited to matters relating to the practice of law. If such a limitation constitutes an impermissible restriction based upon the content of the advertising, there could be no permissible regulation of advertising by attorneys.

Respondents submit that petitioners are not correct and that they have misread the applicable decisions of this Court. The fact that the challenged rule is only applicable to attorneys does not mean that it is imposed with reference to the content of the speech. A content based restriction is one which is aimed at the communicative impact of the speech. The government singles out certain ideas or information for control or punishment either because of the specific viewpoint expressed or, as in the *Linmark case*, because of the effects produced by an awareness of the information conveyed. Tribe, *American Constitutional Law*, 580 (1978).

The challenged rule does not contain either of these vices. The restriction of billboard advertising is ideologically neutral. It is unaffected by whatever political, social, philosophical or other viewpoint the attorney may hold or whatever type of services he may wish to advertise.

The rule is not concerned with the effects produced by an awareness of the information conveyed. It expressly permits the same information to be conveyed through all of the more commonly used media. The rule is concerned solely with the manner--on billboards--in which such information is conveyed.

The governmental interests are particularly strong. In addition to the general public interest in consumer protection and the regulation of commercial transactions, the state bears a special responsibility for maintaining high standards among members of the licensed professions. The interest in regulating attorneys is especially great since attorneys are essential to the function of the administration of justice and have historically been officers of the courts. *Ohralik* v. *Ohio St. Bar Assn.*, 436 U.S. 447, 460 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

Petitioners claim that the state's interest in maintaining high professional standards for attorneys does not justify any restrictions on advertising. In support of their claim they cite *Bates* v. *State Bar of Arizona, supra,* 433 U.S. at 368.

Respondents submit that the fact that the state's interest in professionalism will not justify the suppression of all advertising by attorneys does not mean that it will not justify any limitation on the means which attorneys may use to obtain new clients. There is a vast difference between billboard advertising and other forms of advertising. Billboard advertising, for all practical purposes, has a captive audience. The billboard message is thrust upon the public. It is constantly before the people on the street and in cars and seen without the exercise of any choice of their parts. The same is not true of other forms of advertising. These forms are ordinarily seen only as a matter of choice. *Packer Corp.* v. *Utah*, 285 U.S. 101, 110 (1932); *Lehman* v. *Shaker Heights,* 34 Ohio St.2d 143 (1973), *aff'd,* 418 U.S. 298 (1974).

The interests of the petitioners are minimal. They do not contend that they wish to use billboards for political expression or as an exercise of associational freedom to secure constitutionally guaranteed civil rights. The only reason they wish to use billboard advertising is to obtain new clients. A lawyer's procurement of employment is a subject only marginally affected with First Amendment concerns. It falls within the state's proper sphere of regualtion. *Ohralik* v. *Ohio St. Bar Assn., supra,* 436 U.S. at 459.

The interests of the general public are also minimal. Billboard advertising does little if anything to promote informed and reliable decision making in the purchase of legal services. Billboards are not designed to convey factual information such as the availability and price of legal services. Their function is to furnish a reminder or repetition of a brand name in order to trigger or reinforce impressions already made in the prospect's mind concerning the product or service. The message contained on a billboard must be brief since it is only visible to the prospect for approximately five seconds. The ideal message contains from four to eight words. If the message is much longer, it will be virtually impossible for a motorist to read and comprehend it. Wright, Warner & Winter, *Advertising,* 212 and 318 (1971); Sandage & Fryburger, *Advertising Theory and Practice,* 514 (8th Ed. 1971); Engel, Wales & Warshaw, *Promotional Strategy,* 278 (Rev. Ed. 1971).

The rule allows ample alternative channels of communication for the information which petitioners wish to convey to the public. It expressly permits an attorney to advertise the services which he provides and their cost over radio and television and in newspapers, magazines, other periodicals, telephone directories, city, county and suburban directories, law directories and law lists.

The challenged rule regulates the manner in which attorneys may advertise their services. It is not imposed with reference to the content of the advertising; it serves significant governmental interests; and it leaves open ample alternative channels for the communication of the information. The validity of such a rule is clearly established by previous decisions of this Court, for example, *Friedman* v. *Rogers,* ____ U.S. _____, 99 S.Ct. 887, 894, 59 L.Ed.2d 100, 109-110 (1979); *Bates* v. *State Bar of Arizona,* 443 U.S. 350, 384 (1977); *Virginia Pharmacy Board* v. *Virginia Consumers Council,* 425 U.S. 748, 771 (1976). Petitioners' objections to the rule, therefore, present no substantial question for review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Section 2(B) (1), Article IV, Ohio Constitution

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 1979, three copies of the Respondents' Brief in Opposition were sent by United States first class mail, postage prepaid, to Stanley K. Laughlin, Jr., 2061 Fairfax Road, Columbus, Ohio 43221 and Joseph Waterman, 1187 East Broad Street, Columbus, Ohio 43205, Attorneys for Petitioners. I further certify that all parties required to be served have been served.

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